

UNLAWFUL FILE COPY ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Section 272(b)(1)'s "Operate Independently") WC Docket No. 03-228
Requirement for Section 272 Affiliates)

NOTICE OF PROPOSED RULEMAKING

Adopted: November 3, 2003

Released: November 4, 2003

Comment Date: 15 days after Federal Register publication of this Notice

Reply Date: 25 days after Federal Register publication of this Notice

By the Commission: Commissioner Abernathy issuing a separate statement and Commissioner Martin concurring and issuing a separate statement.

I. INTRODUCTION

1 In this Notice of Proposed Rulemaking, we initiate an inquiry regarding our rules implementing section 272(b)(1) of the Communications Act of 1934, as amended (the Act).¹ We now seek comment on whether we should modify the rules adopted to implement section 272(b)(1)'s "operate independently" requirement. Specifically, we seek comment on whether the operating, installation, and maintenance (OI&M) sharing prohibition is an overbroad means of preventing cost misallocation or discrimination by Bell operating companies (BOCs) against unaffiliated rivals.² We also seek comment on whether the prohibition against joint ownership by BOCs and their section 272 affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located, should be modified or eliminated.

II. BACKGROUND

2 Sections 271 and 272 establish a comprehensive framework governing BOC provision of "interLATA service."³ Pursuant to section 271, neither a BOC nor a BOC affiliate

¹ 47 U.S.C. § 272(b)(1)

² Sections 53.203(a)(2)-(3) of the Commission's rules prohibit a BOC's section 272 affiliate from sharing OI&M functions with the BOC or another BOC affiliate. 47 C.F.R. § 53.203(a)(2)-(3)

³ The term "interLATA service" is defined in the Act as "telecommunications between a point located in a local access and transport area and a point located outside such area." 47 U.S.C. § 153(21). "Telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43)

may provide in-region, interLATA service prior to receiving section 271(d) authorization from the Commission.⁴ Section 272 requires BOCs, once authorized to provide in-region, interLATA services in a state under section 271, to provide those services through a separate affiliate until the section 272 separate affiliate requirement sunsets for that particular state.⁵ Section 272 imposes structural and transactional requirements on section 272 separate affiliates, including the requirement under section 272(b)(1) to “operate independently” from the BOC.⁶

3. In the *Non-Accounting Safeguards Order*, the Commission concluded that the “operate independently” language of section 272(b)(1) imposes requirements on section 272 separate affiliates beyond those detailed in section 272(b)(2)-(5).⁷ As a result, the Commission adopted rules to implement the “operate independently” requirement that prohibit a BOC and its section 272 affiliate from (1) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located;⁸ and (2) providing OI&M services associated with each other’s facilities.⁹ Specifically with regard to sharing OI&M functions,¹⁰ the Commission’s

⁴ 47 U.S.C. § 271(b)(1).

⁵ See 47 U.S.C. § 272(a)(2)(B), (f)(1) (requiring separate affiliate for three years “unless the Commission extends such 3-year period by rule or order”), see also *Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements*, WC Docket No. 02-112, Memorandum Opinion and Order, 17 FCC Rcd 26869, 26876, para. 13 (2002) (“We find that section 272(f)(1) should be interpreted as providing for a state-by-state sunset of the section 272 separate affiliate and related requirements.”) The section 272 provisions (other than section 272(e)) have sunset in New York and Texas. See *Section 272 Sunsets for Verizon in New York State by Operation of Law on December 23, 2002 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, Public Notice, 17 FCC Rcd 26864 (2002), *Section 272 Sunsets for SBC in the State of Texas by Operation of Law on June 30, 2003 Pursuant to Section 272(f)(1)*, WC Docket No. 02-112, Public Notice, 18 FCC Rcd 13566 (2003).

⁶ 47 U.S.C. § 272(b)(1).

⁷ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21981, para. 156 (1996) (*Non-Accounting Safeguards Order*), Order on Reconsideration, 12 FCC Rcd 2297 (1997), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Non-Accounting Safeguards Second Order on Recon*), *aff’d sub nom. Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, 14 FCC Rcd 16299 (1999) (*Non-Accounting Safeguards Third Order on Recon*). Section 272(b)(2)-(5) provides that the section 272 separate affiliate “(2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the [BOC] of which it is an affiliate, (3) shall have separate officers, directors, and employees from the [BOC] of which it is an affiliate; (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the [BOC], and (5) shall conduct all transactions with the [BOC] of which it is an affiliate on an arm’s length basis with any such transactions reduced to writing and available for public inspection.” 47 U.S.C. § 272(b)(2)-(5).

⁸ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-84, paras. 158-62, 47 C.F.R. § 53.203(a)(1).

⁹ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, 21984-86, paras. 158, 163-66, 47 C.F.R. § 53.203(a)(2)-(3).

¹⁰ Operating, installation, and maintenance functions generally include all activity related to installing,

rules prohibit a section 272 affiliate from performing OI&M functions associated with the BOC's facilities. Likewise, they bar a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing OI&M functions associated with the facilities that its section 272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.¹¹ The *Non-Accounting Safeguards Order* declined, however, to impose additional restrictions on the joint ownership of other property between the BOC and its section 272 affiliate or on the sharing of services,¹² concluding that additional structural separation requirements were unnecessary "given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272."¹³

4. At the time of the *Non-Accounting Safeguards Order*, the Commission reasoned that allowing joint ownership of facilities and sharing of OI&M functions between BOCs and their 272 affiliates would create opportunities for improper cost allocation and discrimination that the separate affiliate requirement was intended to prevent.¹⁴ At the same time, the Commission recognized that restrictions on sharing of facilities and services impose costs, including inefficiencies within the BOCs' corporate structures, and that the economies of scale and scope inherent to integration produce economic benefits to consumers.¹⁵ The Commission explained that it was "striking an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination."¹⁶

5. Verizon, SBC, BellSouth, and Qwest have all filed petitions for forbearance seeking relief from the OI&M sharing prohibition.¹⁷ These petitioners have generally argued

operating, and maintaining (e.g., making repairs to) switching and transmission facilities subject to section 53.203(a)(1)

¹¹ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, 21984-86, paras. 158, 163-66, 47 C.F.R. § 53.203(a)(2)-(3)

¹² The Commission clarified that "'sharing of services' means the provision of services by the BOC to its section 272 affiliate, or vice versa." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, para. 178.

¹³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21986, para. 167

¹⁴ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, para. 158.

¹⁵ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21983-84, 21986, 21991, paras. 162, 167-68, 179; see also *Non-Accounting Safeguards Second Order on Recon*, 12 FCC Rcd at 8683, para. 55.

¹⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21986, para. 167, see also *Non-Accounting Safeguards Third Order on Recon*, 14 FCC Rcd at 16310-11, para. 15

¹⁷ Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2) of the Commission's Rules, CC Docket No. 96-149 (filed Aug. 5, 2002) (Verizon Petition), Petition of SBC for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions under Sections 53.203(a)(2) and 53.203(a)(3) of the Commission's Rules and Modification of Operating, Installation, and Maintenance Conditions Contained in the SBC/Ameritech Merger

that, based on actual experience since gaining section 271 approvals, a much more developed record exists today than at the time that the OI&M restriction was adopted to demonstrate the magnitude of the inefficiencies associated with the OI&M restriction. They have contended that the benefits of the OI&M sharing prohibition, which they argued could be achieved through the remaining safeguards and other Commission rules, do not outweigh the substantial costs imposed by this restriction.¹⁸ Opponents of the OI&M forbearance petitions generally have argued that structural regulation, such as the current OI&M sharing prohibition, is more effective than a non-structural approach and that allowing for shared provision of OI&M functions will provide more opportunity for BOCs to engage undetected in cost misallocation, price discrimination, and performance discrimination.¹⁹

III. DISCUSSION

6 We seek comment on whether the Commission should modify or eliminate its rules implementing the “operate independently” requirement of section 272(b)(1) of the Act. Our seven years of experience in implementing the Telecommunications Act of 1996 lead us to re-examine the rules designed to ensure that section 272 affiliates “operate independently” as required by the statute. With this Notice, we seek to determine whether these rules continue to “strike an appropriate balance between allowing the BOCs to achieve efficiencies within their corporate structures and protecting ratepayers against improper cost allocation and competitors against discrimination.”²⁰

7. ***Operating, Installation, and Maintenance Functions.*** We seek comment on whether the cost data suggest that the costs of the OI&M sharing prohibition outweigh the benefits. We seek comment on whether eliminating the prohibition on sharing OI&M functions would materially increase the BOCs’ ability or incentive to discriminate against unaffiliated

Order, CC Docket Nos 96-149, 98-141 (filed June 5, 2003), Petition of BellSouth Corporation for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2)-(3) of the Commission’s Rules, CC Docket No 96-149 (filed July 14, 2003); Petition of Qwest Services Corporation for Forbearance from the Prohibition of Performing Operating, Installation, and Maintenance Functions under Section 53.203(a)(2)-(3) of the Commission’s Rules, CC Docket No 96-149 (filed Oct 3, 2003) Parties to these forbearance proceedings may submit into this docket those parts of the pleadings in the forbearance proceedings that they believe have relevance to this rulemaking

¹⁸ See, e.g., Verizon Petition at 1-3 Although we denied the Verizon Petition, we did not reach the merits of the three-prong analysis under section 10(a) See *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission’s Rules*, CC Docket No 96-149, Memorandum Opinion and Order, FCC 03-271 (rel. Nov 4, 2003) (*Verizon OI&M Forbearance Order*)

¹⁹ See, e.g., AT&T Comments, CC Docket No 96-149, at 8-9 (filed Sept 9, 2002), WorldCom/MCI Comments, CC Docket No 96-149, at 5-6 (filed Sept 9, 2002), Sprint Comments, CC Docket No 96-149, at 9 (filed Sept 9, 2002)

²⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21986, para 167

rivals in the long distance market. We also seek comment on whether it would diminish the ability of the Commission to monitor and enforce compliance with the Act.

8. The BOCs state that elimination of the OI&M sharing prohibition would result in significant cost savings to BOCs' corporate operations. For example, in the Verizon OI&M forbearance proceeding, Verizon demonstrated that significant operational costs could be saved if it could use BOC employees rather than contract workers to perform the section 272 affiliate's OI&M work (e.g., field work, general administration and back office functions).²¹ We seek comment assessing the quantification of cost savings. In the OI&M forbearance proceedings, BOCs have argued that the OI&M restriction creates an unnecessary regulatory barrier that prevents them from providing end-to-end services, especially for large business customers, efficiently and at the same quality as their interLATA competitors.²² If the OI&M sharing prohibition were eliminated, BOCs state that they would gain greater flexibility to provide integrated service offerings that cut across traditional interLATA and intraLATA boundaries, including broadband and advanced services. We seek comment on whether and how consumers would benefit from more efficient operation by the BOCs. We seek comment on whether the market for interexchange services would become increasingly competitive without the OI&M sharing prohibition.

9. Therefore, we seek comment on whether the potential savings to be gained by BOC operations and the potential for increased interLATA competition outweigh any benefits from continuing to apply the OI&M sharing prohibition. We seek comment on whether the OI&M sharing prohibition imposes inefficiencies and what the extent of those inefficiencies is. We also seek comment on the benefits to consumers of allowing more integrated OI&M operations between BOCs and their section 272 affiliates. The Commission has recognized the risks of cost misallocation and discrimination created by sharing of OI&M functions.²³ We seek comment on the magnitude of the risks and adverse consequences of possible anti-competitive conduct facilitated by OI&M sharing. We ask parties to address in their comments the effectiveness of non-structural safeguards alone, rather than maintaining the OI&M sharing prohibition, to prevent and detect cost misallocation and discrimination.

10. ***Joint Facilities Ownership.*** In addition to the OI&M sharing prohibition, the

²¹ See Letter from Dee May, Assistant Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket Nos. 96-149, 01-337, WC Docket No. 02-33, Attach 3 at 1-3 (filed June 4, 2003), Letter from Dee May, Assistant Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-149, Attach at 6-8 (filed June 24, 2003), Letter from Dee May, Assistant Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 96-149 at 2 (filed Aug. 11, 2003).

²² See, e.g., Verizon Petition at 6-7, Verizon Petition, Declaration of Steven G. McCully, para. 4 (explaining that the OI&M sharing prohibition requires “handoffs of customer requests for service and repair that add cost and difficulty in meeting customer expectations.”)

²³ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21984, para. 163.

Commission adopted a rule to implement section 272(b)(1) that prohibits joint ownership of switching and transmission facilities or the land and buildings on which such facilities are located.²⁴ Although we reach no tentative conclusion with regard to this restriction, we seek comment on whether it is needed to prevent cost misallocation and discrimination. We ask parties to identify both the costs and benefits of maintaining or eliminating the joint facilities ownership restriction. We seek comment on whether existing non-structural safeguards are adequate to serve the purpose that the joint facilities ownership restriction was intended to serve. We also ask parties to discuss whether any new safeguards may be needed in the event that the joint facilities ownership restriction is eliminated. Finally, commenters should address how a conclusion by the Commission to eliminate both the joint facilities ownership restriction and the OI&M sharing prohibition would relate to the Commission's conclusion in the *Non-Accounting Safeguards Order* that the "operate independently" language of section 272(b)(1) imposes separate and independent requirements on section 272 separate affiliates beyond those detailed in section 272(b)(2)-(5).²⁵

IV. PROCEDURAL MATTERS

A. *Ex Parte* Presentations

11. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules. See 47 C.F.R. §§ 1.1200, 1.1206. Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required. See 47 C.F.R. § 1.1206(b). Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b).

B. Initial Paperwork Reduction Act Analysis

12. This NPRM may contain a new or modify an existing information collection. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (OMB) to take this opportunity to comment on the possible changes in information collection contained in the NPRM, as required by the Paperwork Reduction Act of 1995, Pub. L. No. 104-13. Public and agency comments are due 60 days from the date of publication of this NPRM in the Federal Register. Comments should address: (1) whether the possible changes in the collections of information are necessary for the proper performance of the functions of the Commission, including whether the information will have practical utility; (2) the accuracy of the Commission's burden estimates; (3) ways to enhance the quality, utility, and clarity of any information collected; and (4) ways to minimize the burden of

²⁴ See *id.* at 21981-84, paras. 158-62, 47 C.F.R. § 53.203(a)(1).

²⁵ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, para. 156, see also n.7, *supra*.

any collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

C. Comment Filing Procedures

13. Pursuant to Section 1.415 and 1.419 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments within 15 days after publication of this Notice in the Federal Register and may file reply comments within 25 days after publication of this Notice in the Federal Register. All filings are to reference WC Docket No. 03-228. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Suite TW-A325, Washington, DC 20554. Two (2) courtesy copies must be delivered to Janice M. Myles, janice.myles@fcc.gov, Federal Communications Commission, Wireline Competition Bureau, Competition Policy Division, 445 12th Street, SW, Suite 5-C327, Washington, DC 20554 and one (1) copy must be sent to Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

14. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998). Comments filed through the ECFS can be sent as an electronic file via the Internet to <<http://www.fcc.gov/e-file/ecfs.html>>. Generally, only one copy of an electronic submission must be filed. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, commenters must transmit one electronic copy of the comments to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address> ". A sample form and directions will be sent in reply.

15. Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

16. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail).

17. (1) The Commission's contractor, Natek, Inc., will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.

18. (2) Commercial overnight mail (other than U.S. Postal Service Express Mail and

Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

19. (3) U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

20. Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW, Room CY-A257, Washington, DC, 20554. They may also be purchased from the Commission's duplicating contractor, Qualex International, Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC, 20554, telephone 202-863-2893, facsimile 202-863-2898, or via e-mail qualexint@aol.com.

21 For further information regarding this proceeding contact Christi Shewman, christi.shewman@fcc.gov, Competition Policy Division, Wireline Competition Bureau, (202) 418-1580.

D. Initial Regulatory Flexibility Certification

22. The Regulatory Flexibility Act of 1980, as amended (RFA),²⁶ requires that an initial regulatory flexibility analysis be prepared for notice-and-comment rule making proceedings, unless the agency certifies that "the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."²⁷ The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."²⁸ In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.²⁹ A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).³⁰

23. In this Notice, we seek comment on whether we should modify or eliminate the rules adopted to implement the "operate independently" requirement of section 272(b)(1) of the

²⁶ See 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

²⁷ 5 U.S.C. § 605(b).

²⁸ 5 U.S.C. § 601(6).

²⁹ 5 U.S.C. § 601(3) (incorporating by reference the definition of "small-business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

³⁰ 15 U.S.C. § 632.

Act³¹ Specifically, we seek comment on whether the OI&M sharing prohibition is an overbroad means of preventing cost misallocation or discrimination by BOCs against unaffiliated rivals.³² We also seek comment on whether the prohibition against joint ownership by BOCs and their section 272 affiliates of switching and transmission facilities, or the land and buildings on which such facilities are located, should be modified or eliminated.³³

24. The rules under consideration in this Notice apply only to BOCs and their section 272 affiliates. Neither the Commission nor the SBA has developed a small business size standard specifically applicable to providers of incumbent local exchange service and interexchange services. The closest applicable size standard under the SBA rules is for Wired Telecommunications Carriers.³⁴ This provides that such a carrier is small entity if it employs no more than 1,500 employees.³⁵ None of the four BOCs that would be affected by amendment of these rules meets this standard. We next turn to whether any of the section 272 affiliates may be deemed a small entity. Under SBA regulation 121.103(a)(4), “SBA counts the ... employees of the concern whose size is at issue and those of all its domestic and foreign affiliates ... in determining the concern’s size.”³⁶ In that regard, we note that, although section 272 affiliates operate independently from their affiliated BOCs, many are 50 percent or more owned by their respective BOCs, and thus would not qualify as small entities under the applicable SBA regulation.³⁷ Moreover, even if the section 272 affiliates were not “affiliates” of BOCs, as defined by SBA, as many are, the Commission estimates that fewer than fifteen section 272 affiliates would fall below the size threshold of 1,500 employees. Particularly in light of the fact that Commission data indicate that a total of 261 companies have reported that their primary telecommunications service activity is the provision of interexchange services,³⁸ the fifteen section 272 affiliates that may be small entities do not constitute a “substantial number.” Because the proposed rule amendments directly affect only BOCs and section 272 affiliates, based on the foregoing, we conclude that a substantial number of small entities will not be affected by our proposal.

25. Accordingly, for the reasons set forth above, we certify that the proposals in this

³¹ 47 U.S.C. § 272(b)(1)

³² 47 C.F.R. § 53.203(a)(2)-(3)

³³ 47 C.F.R. § 53.203(a)(1)

³⁴ 13 C.F.R. § 121.201, NAICS code 517110

³⁵ *Id.*

³⁶ 13 C.F.R. § 121.103(a)(4)

³⁷ See 13 C.F.R. § 121.103(c)

³⁸ See FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (Aug. 2003). This source uses data that are current as of December 31, 2001.

Notice, if adopted, will not have a significant economic impact on a substantial number of small entities.

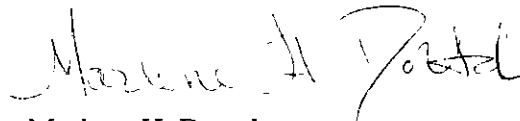
26 The Commission will send a copy of the Notice, including a copy of this Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.³⁹ This initial certification will also be published in the Federal Register.⁴⁰

V. ORDERING CLAUSES

27. IT IS ORDERED that, pursuant to sections 2, 4(i)-(j), 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 152, 154(i)-(j), 272, 303(r), the Notice of Proposed Rulemaking IS ADOPTED.

28. IT IS FURTHER ORDERED, that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this *Notice of Proposed Rulemaking*, including the Initial Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION



Marlene H. Dortch
Secretary

³⁹ 5 U.S.C. § 605(b)

⁴⁰ *Id.*

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY**

*Re Section 272(b)(1)'s "Operate Independently" Requirement for Section 272
Affiliates, Notice of Proposed Rulemaking*

As explained in my dissent to the companion order denying Verizon's petition for forbearance from the OI&M rule, I believe the Commission has improperly construed section 10(d) of the Act, and thus has improperly denied forbearance. But I am pleased that the Commission is willing to consider elimination of the ban on sharing OI&M functions in this rulemaking, and I look forward to a decision on the merits.

**CONCURRING STATEMENT OF
COMMISSIONER KEVIN J. MARTIN**

*Re Section 272(b)(1) "Operate Independently" Requirement for Section 272
Affiliates, WC Docket No. 03-228*

Petition of Verizon for Forbearance from the Prohibition of Sharing Operating,
Installation, and Maintenance Functions Under Section 53.203(a)(2) of the
Commission's Rules; **CC Docket No. 96-149**

I am pleased that the Commission is reviewing its requirements regarding its OI & M rules governing a Bell Operating Company's (BOC) section 272 affiliate. Although I had reservations about the statutory authority to allow the Commission to forbear from the statute, I support the notice asking whether these rules are required. I concur in the notice, however, because I am disappointed by my colleagues failure to support a tentative conclusion to eliminate these rules. In my view, sufficient evidence exists to tentatively conclude that the operating, installation, and maintenance sharing prohibition is an overbroad means of preventing improper cost allocation or discrimination as required by the statute.

Finally, I am confused as to why some of my colleagues advocate complete elimination of any OI&M requirement as in the public interest in one item, but are unwilling to support the same "tentative conclusion" in the other item. If they were willing to decide the issue finally today, why are they unwilling to make the same conclusion tentatively.